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The Honorable Barbara J. Rothstein

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

STATE OF WASHINGTON,

Plaintiff,

v.

BETSY DeVOS, in her official capacity as
Secretary of the United States Department of
Education; and the UNITED STATES
DEPARTMENT OF EDUCATION, a federal
agency,

Defendants.

NO. 2:20-cv-01119-BJR

PLAINTIFF STATE OF
WASHINGTON'S OPPOSITION TO
DEFENDANTS' MOTION FOR
CLARIFICATION REGARDING
SCOPE OF PRELIMINARY
INJUNCTION

I. INTRODUCTION

Defendants contend the Court did not intend to enter an injunction that restrained them from implementing their unlawful statutory interpretation beyond Washington's border, but the language of the Court's Order states otherwise. The Order enjoined Defendants from implementing or enforcing their erroneous statutory limitation, without a geographic limitation. Dkt. #54 at p. 21. The Court's injunction was within its authority. If the Court is concerned about the scope of the injunction, Washington anticipates requesting it to order expedited briefing on partial summary judgment on Count I alleging the Interim Final Rule is contrary to law, which involves exclusively legal issues.

II. ARGUMENT

A. An Injunction Reaching Beyond Washington's Borders Is Within the Court's Authority

The Administrative Procedure Act (APA) provides express authority for the interim remedy this Court ordered. Specifically, 5 U.S.C. § 705 provides that “[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury,” a court “may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.” By authorizing the court to suspend “the effective date” of an agency’s action, this express statutory remedy applies to a rule as a whole rather than to particular parties or locations. *See Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 562 (D.C. Cir. 2015) (Kavanaugh, J., dissenting in part) (§ 705 “authorizes courts to stay agency rules pending judicial review”) (emphasis omitted). The Court was within its authority under the APA to “postpone the effective date” of Defendants’ unlawful statutory interpretation pending resolution of the merits.

Even apart from the Court’s remedial authority under the APA, the Court properly exercised its discretion in unique case with “potentially tragic consequences” (Dkt. #54 at p. 20), to suspend the Interim Final Rule pending final judgment. “Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents.” *Trump v. Int’l Refugee Assistance Project (IRAP)*, 137 S. Ct. 2080, 2087 (2017). In evaluating a request for an injunction, a court must consider “the overall public interest.” *Id.* And when weighing the equities the court will consider “preventable human suffering,” particularly when it “affect[s] individuals possess[ing] limited resources” *Golden Gate Rest. Ass’n v. City & County of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008).

Here, the Court concluded the Department lacked statutory authority—“either specific or general—to promulgate rules” and ignored a “statute [that] could hardly be less ambiguous.”

1 Dkt. #54 at pp. 12, 13. The Court found the Department’s primary argument “generously put, a
 2 stretch; its adoption would render all but the most laconic Congressional directives ambiguous.”
 3 *Id.* at p. 15. In these circumstances, precedent exists for the suspension of the challenged agency
 4 action pending resolution of the merits. *See, e.g., Am. Fed’n of Labor & Cong. of Indus. Orgs.*
 5 *v. Chao*, 297 F. Supp. 2d 155, 156–57 (D.D.C. 2003) (“A one-year postponement of the effective
 6 date of the new Rule will cause no harm to either the Department of Labor or to union
 7 members.”).

8 Further, the harmful impact and “preventable human suffering” of the Department’s
 9 invalid statutory interpretation does not stop at Washington’s borders. *See, e.g., Dkt. #54* at p. 8
 10 (“In Washington, *as in many states*, not all Title I eligible schools choose to participate in Title
 11 I.”) (emphasis added); *id.* at p. 19 (“The nature of this pandemic is that its consequences have
 12 fallen most heavily on *the nation’s* most vulnerable populations, including its neediest
 13 students.”) (emphasis added).

14 Ordering relief beyond Washington’s borders is equitable and necessary to provide
 15 Washington complete relief. The purpose of the CARES Act appropriation at issue is to provide
 16 funding to the nation’s most vulnerable schools to respond to and prevent further spread of
 17 COVID-19 throughout the United States. Because of the highly contagious nature of the virus—
 18 exacerbated by the facts that the virus can be transmitted by asymptomatic carriers and residents
 19 of the United States may freely travel between states—there is no way to limit steps taken to
 20 address COVID-19 to just one state. Limiting relief to Washington would partially protect
 21 Washington schools, but it would leave students and families in neighboring states without the
 22 protections Congress intended, and these individuals could and would freely travel across
 23 Washington’s borders. Ordering the Department to suspend enforcement of its erroneous
 24 statutory interpretation beyond Washington’s border is necessary to protect the most vulnerable
 25 Washington students from the spread of COVID-19. *See City & County of San Francisco v.*
 26 *Barr*, 965 F.3d 753, 765 (9th Cir. 2020) (“appropriate inquiry” is “whether Plaintiffs themselves

1 will continue to suffer their alleged injuries if [the federal government] were enjoined from
 2 enforcing the Challenged Conditions only in [the Plaintiffs' State].”).

3 Nor does Article III limit the Court from halting Defendants' implementation of their
 4 unlawful statutory interpretation during the pendency of this suit. *See* Dkt. #55 at p. 4. Contrary
 5 to Defendants' implication, Article III courts, including the Supreme Court, “have issued
 6 injunctions that extend beyond just the plaintiff for well over a century.” Mila Sohoni, *The Lost*
 7 *History of the “Universal” Injunction*, 133 Harv. L. Rev. 920, 924, 935–54 (2020). Most
 8 recently, in *Trump v. International Refugee Assistance Project*, involving President Trump's
 9 second Executive Order suspending the entry of foreign nationals from certain specified
 10 countries, the Court narrowed a nationwide injunction by limiting it to foreign nationals with a
 11 bona fide relationship with the United States, but left in place nationwide injunctions with respect
 12 to the plaintiff “and those similarly situated.” 137 S. Ct. at 2087. Defendants' contention that
 13 nationwide injunctions protecting parties other than the plaintiff violate Article III cannot be
 14 squared with *IRAP*.

15 **B. If the Court Is Concerned About the Scope of the Injunction, It Should Order**
 16 **Expedited Summary Judgment Briefing**

17 Washington recognizes preliminary injunctions that apply beyond just the plaintiff
 18 recently have been disputed by the federal government. In *California v. Azar*, 911 F.3d 558 (9th
 19 Cir. 2018) (not cited by Defendants), the Ninth Circuit recognized there is “no bar” to nationwide
 20 preliminary injunctive relief, but it reversed a nationwide injunction of an IFR as overbroad. In
 21 that case, however, the asserted harms were exclusively economic, whereas here the harm has
 22 “potentially tragic consequences” to health and life. *See* Dkt. # 54 at p. 20. Moreover, in a case
 23 that preceded the current Administration, the Ninth Circuit reversed a district court's state-wide
 24 injunction as overbroad. *Stormans, Inc. v. Selecky*, 586 F. 3d 1109 (9th Cir. 2009). In *Storman's*
 25 (also not cited by Defendants), the district court had enjoined the Washington Pharmacy Board's
 26 rules prohibiting a pharmacist from refusing to dispense pharmaceuticals, including Plan B,

1 based on religious, moral, or other objections. *Storman*’s is distinguishable because, unlike here,
 2 the injunction was broader than needed to address the claimed First Amendment right: it allowed
 3 *all* pharmacists to refuse to dispense Plan B for *any* reason including “personal distaste” or
 4 discriminatory practices. *Id.* at 1140. And more importantly, the Court held that granting the
 5 overbroad injunction could result in “otherwise avoidable human suffering,” while limiting the
 6 injunction to the plaintiffs would mitigate much of the harm that others “in the state of
 7 Washington would otherwise face under an injunction that allows any and all pharmacies and
 8 pharmacists to refuse to dispense Plan B for any reason.” *Id.* at 1140–41. Thus, that court said
 9 that “[t]he district court should have limited the injunction to the named Appellees, as was
 10 requested by the Appellees themselves in their initial motion for a preliminary injunction[.]”
 11 *Id.* at 1140.

12 If the Court has concern about the propriety of ordering preliminary relief that extends
 13 beyond Washington’s border, Washington will request the Court to order expedited briefing on
 14 a motion for partial summary judgment on its claim that the IFR is contrary to law, Dkt. #1 at
 15 p. 27 (Count I). This claim involves exclusively legal issues and can be resolved even before
 16 Defendants produce the administrative record. Washington would anticipate filing its motion for
 17 partial summary judgment one week after the Court’s order, with Defendants filing their
 18 opposition two weeks thereafter, and Washington filing its reply one week later.

19 III. CONCLUSION

20 The Court should deny Defendants’ motion for clarification.

21 DATED this 31st day of August 2020.

22 ROBERT W. FERGUSON
 23 Attorney General

24 s/ R. July Simpson

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 31st day of August 2020, at Tacoma, Washington.

s/ R. July Simpson

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